UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

NATIONAL HOT ROD ASSOCIATION (NHRA),	)	
Respondent,	)	Case Nos.: 02-CA-185569
	)	22-CA-190221
and	)	22-CA-192686
INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, (IATSE)	)	
Charging Party.	)	

NATIONAL HOT ROD ASSOCIATION (NHRA),	)	
Employer,	)	Case No.: 22-RC-186622
and	)	
INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, (IATSE)	)	
Petitioner.	)	

NATIONAL HOT ROD ASSOCIATION'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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NOW COMES the National Hot Rod Association ("NHRA"), Employer and Respondent herein, and files its Brief in Support of its Exceptions to the Decision of the Administrative Law Judge as follows:

I. STATEMENT OF THE CASE

This case arises out of a representation proceeding and election objections filed by NHRA on December 9, 2016, and a series of unfair labor practice charges filed against NHRA by the International Alliance of Theatrical Stage Employees ("Union") between September 2016 and August 2017.[1] On October 20, the Union filed a Petition for Representation with Region 22 of the National Labor Relations Board ("Region") seeking to represent a unit of "event worker" television production employees employed by NHRA on an intermittent basis throughout the country. (GC Exh. 1(s)).[2] Pursuant to a Stipulated Election Agreement, a secret mail-ballot election was conducted from November 15 to December 2 via U.S. Mail. (GC Exh. 1(s)). According to the most recent Tally of Ballots, out of approximately 99 eligible voters, 35 votes were cast in favor of the Union, 34 votes were cast against the Union, and two ballots were challenged by the Region. (P. Exh. 11)[3]. Because the challenges were sufficient to affect the outcome of the election, the Union was not certified.

NHRA filed timely election objections, alleging that irregularities in the election and conduct by the Region deprived multiple eligible voters an adequate opportunity to vote, and that the number of disenfranchised individuals was sufficient to affect the outcome of the election.

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[1] All dates referred to herein are 2016 unless otherwise stated.

[2] Herein, Transcript page citations are referred to "Tr. __," followed by the page number. General Counsel Exhibits are referred to as "GC Exh. __," followed by the exhibit number; Respondent/Employer Exhibits as "R. Exh. __," followed by the exhibit number; and Petitioner Exhibits as "P. Exh. __," followed by the exhibit number.

[3] The most recent tally was conducted on August 16, 2017, after the Union withdrew its outstanding ballot challenges.

(GC Exh. 1(s), Attachment B). Following an investigation, on September 8, 2017, the Regional Director issued an Order Further Consolidating Cases, Partial Decision on Objections, Order Directing Hearing and Notice of Hearing on Challenged Ballots and Objections, which determined that NHRA's objections raised material issues warranting a hearing. (GC Exh. 1(s)). The Regional Director's Order further consolidated NHRA's objections for hearing with the Consolidated Complaint issued on August 31, 2017, which alleged violations of the National Labor Relations Act based on the unfair labor practice charges filed by the Union. (GC Exh. 1(s)).

Specifically, the Consolidated Complaint ("Complaint") alleged that NHRA violated Section 8(a)(1) by soliciting employee grievances, threatening employees with unspecified reprisals, creating an unlawful impression of surveillance, and making an unlawful statement to employees about job offers. The Complaint further alleged that NHRA violated Section 8(a)(3) by terminating four employees.[4] (GC Exh. 1(q) ¶¶ 9-14). On September 13, 2017, NHRA timely filed its answer, denying the material allegations in the Complaint and raising certain affirmative defenses, including that the terminations challenged by the General Counsel were made for lawful, non-discriminatory business reasons.[5] (GC Exh. 1(u)). The Union and NHRA subsequently settled three of the four alleged Section 8(a)(3) violations through private settlements, leaving only the 8(a)(3) allegation relating to Nathan Hess in dispute. (GC Exh. 1(aa), Tr. 13). The Section 8(a)(1) allegations remained as alleged in the Complaint. A hearing on this host of issues was conducted in Brooklyn, New York on December 7, 2017; February 27 and 28, 2018; and March 1, 2, 5, 12,

[4] On March 2, 2018, the General Counsel moved to amend the complaint to strike the Section 8(a)(3) and (1) allegations related to James Eddie Dean and Josh Piner due to the parties' private settlements of these claims. The requests were granted, and the allegations were dismissed from the Complaint. (Tr. 472-473). Claims related to Timothy Glass, a third alleged discriminate, were settled and withdrawn on November 27, 2017. (GC Exh. 1(y)).

[5] On October 6, 2017, NHRA amended its answer to correct an inadvertent error and add an affirmative defense, which was ultimately dismissed by the Judge. (GC Exh. 1(x), Tr. 604).

and 13, 2018 before the Honorable Benjamin W. Green, Administrative Law Judge. All parties filed timely post-hearing briefs.

On November 9, 2018, the ALJ issued a Decision recommending that all of NHRA's objections be overruled, and that the election results be certified. The ALJ further found that NHRA violated the Act by discharging Nathan Hess, soliciting grievances, creating an impression of surveillance, and informing potential employees that they could not be hired until the election was over; however, he dismissed the allegation relating to threats of unspecified reprisals. The NHRA now files Exceptions to the ALJ's Decision, as well as this Brief in Support.

II. STATEMENT OF MATERIAL FACTS

The National Hot Rod Association is the largest official sanctioning body for the sport of drag racing; it is the organization that sets the rules for drag racing, promotes safety in the sport, and hosts competitive racing events around the country. (Tr. 476, 477-483, R. Exh. 5). It is the racing that lies at the heart of the organization, and each year, NHRA hosts a circuit of 24 large-scale events at tracks throughout the United States. (GC Exh. 18, Tr. 480, 481, 510-511, R. Exh. 5, p. 4). The events run between February and November, are typically held from Thursday until Sunday, and are open to the public. (GC Exh. 18, Tr. 481, 431, 538).

To expose the sport to a wider audience, races and racing-related events are televised on the FOX/FOX Sports Networks. (Tr. 480, 531-532). The television programs use a combination of live footage and pre-recorded video clips, and are usually aired at or near the time the races themselves occur. (*See* Tr. 538, 546-549, R. Exh. 4). NHRA's televised races, and the employees who produce them, are the subject of the instant case.

A. NHRA as Producer: Changes in the 2016 Season

Although NHRA races have long been televised events, prior to 2016, the broadcasts were

not created by NHRA; for many years, ESPN Regional Television ("ERT") and ERT employees produced the programs, which then aired on the ESPN Networks. (Tr. 232, 485, 517-519). In the summer of 2015, however, NHRA ended its relationship with ESPN and ERT, and entered into a new agreement with FOX Sports to telecast NHRA's races. (Tr. 518-520). Under this agreement, NHRA – and not FOX – would be responsible for providing fully produced television programs to FOX/FOX Sports, which the network would then air. (*Id.*) And so, in 2016, for the first time in its history, NHRA went into the television business, establishing its own in-house production and broadcast department, and creating its own television programming with its own employees. (*Id.*, Tr. 484-485, 518-519).

To staff this new endeavor, between September 2015 and January 2016, NHRA hired a new workforce, some of whom previously worked for ESPN, to produce programs for the 2016 racing season. (Tr. 484-485, 520-521). Given the nature of the races, employees were hired to work for NHRA on an intermittent, as-needed basis. (Tr. 477-478; GC Exhs. 19, 20). They perform work that is standard in the television-production industry and necessary to ensure that the programs can air on FOX/FOX Sports as planned; this includes operating cameras, handling audio and video for the show, or preparing on-screen graphics. (Tr. 213-214).

Ultimately, the responsibility for creating a seamless and well-produced broadcast falls to Executive Producer Ken Adelson ("Adelson"), who oversees and manages NHRA's television production operation and develops the creative content for each show. (Tr. 520-521). In the 2016 season, Adelson was assisted by Technology Executive Michael Rokosa ("Rokosa") and Producer Peter Skorich ("Skorich"). (Tr. 520-521). As Technology Executive, Rokosa managed the budget for the operation, handled the hiring and scheduling of employees, and negotiated agreements with outside vendors. (*Id.*) As Producer, Skorich coordinated all of the video, audio, sound, and

graphics elements necessary for each program.[6] (Tr. 525-526, 557, 569). Both Skorich and Rokosa reported directly to Adelson, and together, all three supervised and managed the television production employees as necessary. (Tr. 520-521, 557-558, 435).

Virtually all of the employees, except for the camera operators, perform their television production work from two trailers, which in 2016 were rented by NHRA from a company named F&F Productions. (*See* GC Exh. 22, Tr. 214, 241-243, 248). The trailers contain all of the necessary technical and production equipment needed to edit and facilitate the broadcast of the program. (*Id.*)

On the days of the televised racing events, Adelson, Skorich, and Rokosa held pre-production meetings each morning, where they review in detail "the rundown" of the day's show, which is a chart indicating the minute-by-minute sequence of the technical elements (e.g., live and pre-recorded video clips) required for the specific program. (Tr. 539, 628-629, 641-642, *see e.g.*, R. Exh. 4). All relevant employees receive a copy of the rundown prior to the show and use it to know when the technical elements they are responsible for are set to air in the overall sequence of the show. (*Id.*) Employees are expected to raise questions and address any issues that they may have regarding their work as reflected on the rundown at the pre-production meeting to avoid errors during the show. (Tr. 546-548, 641-642). Once the broadcast begins, employees are responsible for performing their assigned functions and staying up-to-date on the show rundown to ensure that all their assigned elements of the show are in place and ready to air at the appropriate time. (Tr. 548-549, 645-646).

Not surprisingly, 2016 was a year of learning for NHRA. NHRA had not previously produced its own television programs and it did not have a template or prior year's budget to

[6] Skorich no longer produces television shows for NHRA; as such, it was inappropriate for the ALJ to make any adverse inference based on NHRA's failure to call him to testify. Exception 51.

follow, and thus, it was met with certain challenges. (*See* Tr. 96, 485, 528-529, 532-533, GC Exhs. 2, 3). By September, it became apparent that the 2016 television production operation was running over budget. (Tr. 96). In response, Adelson developed a cost-reduction plan, which was put into effect during the last six races of the season. (Tr. 531-533).

But reining in the budget wasn't the new department's only challenge. Beginning at the first NHRA racing event in mid-February and continuing through 2016, NHRA's new employees raised various work-related issues and concerns on a regular basis. (Tr. 256-257, 391-396, 299-300, 418, 660). In particular, employees – many of whom were accustomed to ESPN's methods – questioned the manner in which the shows were being produced; they also lodged multiple complaints about the quality and frequency of the meals that NHRA provided to the event crew. (Tr. 255, 390-396).[7] Other issues included per diem payments, safety, and sharing rental cars. (Tr. 299-300, 501). Beginning in February, NHRA worked with the employees in an effort to resolve some problems, and some solutions were developed, particularly with respect to the employees' safety concerns. (*See* Tr. 489-491, 405-408, 500-501).

IATSE Representative John Culleeny ("Culleeny") learned of the NHRA employees' complaints, so he arranged a meeting with a group of event workers to discuss their issues and sign authorization cards to join the Union. (Tr. 166). The record demonstrates that the first union meeting took place on or about August 6 in Kent, Washington, coinciding with the Seattle, Washington NHRA racing event held during that same period. (Tr. 166, 258). Nathan Hess ("Hess") testified that he attended this meeting, and that there were approximately six employees who attended overall. (Tr. 258). Hess signed a union authorization card at this meeting, later

[7] While not explored in depth on the record, the primary reason NHRA brought their work in-house was because ESPN's production costs were too high, and included expenses which were no longer customary in the industry, and which ESPN passed on to NHRA.

attended other union meetings in early September, and talked to other non-supervisory employees about the union during the same period of time. (Tr. 258-259).

Following the first meeting, the Union held additional meetings, one in mid-August at the Brainerd, Minnesota race and two in early September at the Indianapolis, Indiana race. (Tr. 261-262, 264). With respect to the Indianapolis union meetings (which the Union decided to hold at a meeting room in the hotel where employees were staying for the race), employee James Dean testified that NHRA Director Jim Sobczak ("Sobczak") – who was also staying at the hotel – was sitting in the hotel bar adjacent to the meeting room while the meeting was taking place. (Tr. 399-400).[8] While Dean testified that Sobczak nodded at some employees when he saw them, there is no evidence on the record that Sobczak knew the employees were meeting with the Union; indeed, at that time, the campaign was still unknown to NHRA, and remained so until Labor Day weekend.

B. The Employment and Termination of Tape Producer Nathan Hess

While bringing show production in-house clearly represented a tremendous undertaking (and involved tremendous growing pains), to the NHRA, the potential benefit made it worthwhile – to this end, under the FOX agreement, four NHRA programs per year would be aired on the FOX broadcast network as opposed to the FOX Sports cable network, offering NHRA exposure to mainstream viewers and significantly expanding its reach – one of the organization's principal goals. (Tr. 530-531, 538-539). Only a handful of key races were designated for the FOX broadcast; of these, the most prestigious was the one held in Indianapolis, Indiana, on Labor Day, 2016. (*Id.*) According to Adelson, the Indianapolis race was the "premier race of the year[;]" for fans of the NHRA, it was "their Daytona 500." (Tr, 538). It was during this important telecast

[8] Sobczak did not surveil employees, and there is no allegation in the Complaint that he did so. There is also nothing in the record to suggest that Sobczak saw Hess attending this meeting.

that Nathan Hess's performance cost him his job.

The record reflects that Nathan Hess was not Adelson's first choice for the position of tape producer. Hess had limited experience with tape producer duties, having only performed the work on eight to ten occasions when he was employed by ESPN; indeed, he was initially hired by NHRA as a pit producer, but after Adelson's other choices turned down his offers of employment, he turned to Hess, deciding to take "a chance on someone less experienced . . . [who] could grow into the position." (Tr. 523). Hess accepted Adelson's offer, and his agreed-upon rate of pay, excluding any fringe benefits, was $500 per day. (Tr. 524). As this was lower than the typical tape producer rate, Adelson promised Hess he would revisit the salary issue later in the season. (Tr. 526-527). Hess began work as an NHRA tape producer in February, 2016, and was supervised in his role by Skorich, Rokosa, and Adelson. (GC Exh. 19, Tr. 208, 210, 218, 523-524).

At the hearing, Hess described his primary duties and responsibilities as a tape producer as being organized and ensuring that video clips were in place and ready to air during the program:

> ***Main duty is really to be organized*** . . . You are to work with the producer, to plan out the needs for the needs for the week, the race via – through tape, replay or pre-produced items. ***You are also the hub for a lot of things***, ***for – anything that's coming up that you're going to air***, going to break, you need to tell graphics, hey, graphics I got this video, have this graphic ready, ***so everything seamlessly airs going to break,*** or coming back from break. You're producing live packages or pieces of video . . . ***[Y]ou try to anticipate everything, and you try to be at least a few minutes ahead***, so you can have everything, and you try to be at least a few minutes ahead, ***so you can have everything ready when it's actually needed***.
> (Tr. 223-225) (emphasis added).

Hess testified that he remained about "one page and a half ahead" on the rundown chart to ensure that all of the video clips required for the show were available and ready to air at the appropriate time. (Tr. 225, 313). In essence, Hess's job was to organize all of the video clips in the proper file formats in a computer system called the "Xfile 3" to make sure that they would be

immediately available and ready to be played through the EVS equipment when the producer and director called for them. (Tr. 525-526, 651-652). As Hess emphasized, his job involved effective communication, noting that during a broadcast, "you have to communicate well." (Tr. 313).

During Hess's eight months of employment, he performed adequately, although several issues arose regarding his behavior and performance, many of which related to his tendency to schedule himself for unauthorized travel days. Indeed, less than two months into Hess's employment, Adelson and Skorich were already expressing concerns about his abilities and skill as a tape producer. Specifically, on March 23, in the context of discussing Hess's unauthorized travel, Adelson emailed Skorich and stated: "I'm still not thrilled with his overall performance and not sure if he's out *[sic]* guy for the long term." (R. Exh. 8, p. 1).

Seemingly unaware of his lackluster reputation, Hess repeatedly inquired about the raise Adelson had promised. (Tr. 526-527). Although the initial plan had been to bump Hess to $550 per day (and in July, Skorich had told Hess that "everything look[ed] good" for the additional $50), by late summer, Adelson – who had since learned of the budget constraints – decided to grant Hess only an additional $25, raising him to a $525 daily rate. (Tr. 526-527, GC Exh. 20, JD 6: 26-27). At the hearing, Adelson reasoned that he granted Hess the $25 despite the budget concerns, because he wanted to fulfill the promise he had made to Hess when he was hired, and he deemed Hess's performance at the time to be "adequate." (*Id.*) Hess, who was expecting an increase to $550, was informed of the change after it was approved, and his potentially disappointing raise went into effect on September 1.

Labor Day of 2016 fell four days later, on Monday, September 5. This was the final day of NHRA's premiere Indianapolis show, and the Monday telecast would be one of the select

broadcasts to be aired live on the main FOX Network. (Tr. 538). The importance of this event could not have been missed by anyone working at NHRA.[9]

In addition to broadcasting live video of the Monday races, the program being prepared for FOX also called for assorted "feature" pieces – pre-recorded video clips that shaped the narrative of the show, or highlighted content important to NHRA's sponsors – to be played at designated times. (R. Exh. 4). Four of the feature clips prepared for the Labor Day broadcast included (1) a one-minute-and-fifteen-second clip titled "Visitors' Guide To Indianapolis," which was scheduled to air at 1:45 p.m.; (2) a two-minute clip titled "Mello Yello in the Spotlight – JR Todd and Crampton Workout Feature," scheduled to air at 2:07 p.m.; (3) a one-minute-and-thirty second clip titled "Del Worsham's Mello Yello Feature," scheduled to air at 2:15 p.m.; and (4) a one-minute-and-five-second clip titled "Tony P Race Worsham in a Toyota Feature," scheduled to air at 2:55 p.m. (Tr. 548-553, R. Exh. 4). Of these, the Del Worsham's Mello Yello Feature carried the most importance – this was a video clip created for NHRA's largest corporate sponsor, Mello Yello, to showcase a car it had developed specifically for the Indianapolis race.[10] (Tr. 548-553, 647-650, 679-680, 684). These clips had been announced in the pre-production meeting that morning, and were included, along with their scheduled airing time, in the rundown. (Tr. 572, R. Exh. 4, 5).

Accordingly, it came as a shock to the production crew when, within a span of seventy minutes, from 1:45 to 2:55 p.m., during NHRA's live premiere presentation on the main Fox network, these four clips – all of which Hess was responsible for running – did not appear on air,

[9] It is undisputed that Hess was aware of the importance of this broadcast. On this point, he testified that he "most definitely" understood the importance of the Indy race, and characterized it as "the big race," noting that being on the Fox network was important. (Tr. 291-292). Hess also would have known that Mello Yello was NHRA's largest sponsor.

[10] When this clip did not air, the sponsor Mello Yello complained to the CEO of NHRA. (Tr. 553-554).

because Hess did not pull them up. (Tr. 553). Rokosa, who was in the production trailer when the Mello Yello clip did not air, testified that the immediate reaction was "panic[:]"

> "[W]hen I was in the truck, where a clip was called for by the producer to be played live to air and there was a resultant energy, as it was reported, that the clip was not available, and then a panic around where do we go next, how do we -- you know, what's --what are we going to do, that two-minute piece -- and two minutes is a long time in TV to have to cover for. And I remember the panic, that's probably the most, you know, at that point." (Tr. 647).

While the production crew may have felt panic, Executive Producer Adelson's response was more decisive. Adelson explained that Hess's actions undermined the hard work of the entire crew, and "put the [NHRA's] show in jeopardy." (Tr. 554-557). He further stated that, in his 35 years of experience in the production industry, he had never witnessed an employee fail to have so many video clips ready for air during a live show. At the least, Adelson reasoned, it demonstrated that Hess lacked the skill or ability to perform a critical job function. (Tr. 554). At worst, it suggested that Hess's actions were intentional. (Tr. 554). Either way, when the clips did not air, it is clear that Adelson's immediate instinct was to terminate whomever was responsible. Nor was Adelson interested in hearing excuses; as he candidly testified, equipment malfunction was "not anything I would look at. From my position, the [clip] runs or it doesn't run." (Tr. 567).

Still, Adelson took no immediate action during the race, and on or about September 7 or 8, he spoke to Rokosa and Skorich about Hess's failure to air the clips. (Tr. 554-555). All three discussed the negative impact that Hess's actions had on the quality of the Indianapolis show. (Tr. 554-556, 652-653). Moreover, during this conversation, Rokosa informed Adelson that he had been shown that the Del Worsham's Mello Yello Feature was in fact available on the server at the

time of broadcast and thus ready to air. (Tr. 557, 652-653, 677-681).[11] Notably, while Rokosa testified at the hearing regarding the circumstances under which he saw the missing clip, he, like Adelson, further stated that in his opinion, even if there had been an equipment malfunction, it still would not have excused Hess's conduct; specifically, Rokosa testified that he "took exception to the fact that the equipment was being blamed for an error. Frankly, whatever transpired that caused the operational error, you know, own up to it if it was a … personal error or mistake or whatever, own up to it, but don't blame the equipment." (Tr. 656). Moreover, also like Adelson, Rokosa testified that in his thirty-eight years of production, he had never seen someone fail to call up so many clips during one broadcast. (Tr. 654-655).

To Adelson, the discussion with Rokosa and Skorich confirmed his first impression that Hess had failed in this critical respect, at this critical time; accordingly, he made the official decision to terminate Hess's employment. (Tr. 554-558). On September 14, Skorich informed Hess via telephone that Hess had been terminated for his poor performance at the race. (Tr. 303).[12]

Hess's version of events from September 5 conflicts somewhat with Adelson and Rokosa's version, although Hess does not dispute the fact that video clips did not air during the FOX

[11] Rokosa further testified that following this incident, the production crew experienced no issues with the Xfile 3 device, and it was not repaired or replaced, suggesting that the device was working properly at the time of the Indianapolis race. (Tr. 661).

[12] While the record reveals that initially, Skorich attempted to call Hess to inform him of the termination while Rokosa was also on the line as a witness, they did not reach him when they tried to call him. Skorich subsequently spoke to Hess without Rokosa on the line. Rokosa never testified that he was on the phone for the termination conversation; he recounted only that he was on the phone when Skorich *tried* to call Hess. (Rokosa's testimony was that "within an hour or so, that phone call, we tried -- Pete and I did try to reach Nate." Tr. 654). This is consistent with the email cited by the ALJ in his Decision, in which Skorich notes he was alone on the phone when he spoke with Hess. (JD 10). Accordingly, the ALJ's findings in this respect are in error, and his discrediting of Rokosa's testimony as a result of his misunderstanding was erroneous as a matter of law. (Exception 50).

broadcast, or that Skorich told him he was terminated based on his performance in Indianapolis. (*See* Tr. 301-302, 303). Hess testified that he was aware that at this race, like others, it was his responsibility to ensure that scheduled video clips were in place and ready to air during the program. (Tr. 302, 313). He claimed, however, that the reason for his failing to air the clips was because the Xfile 3 device malfunctioned on September 5, preventing him from having the clips ready for the show. (Tr. 269-272). In particular, on the morning of September 5, Hess testified that he and other employees met with Adelson and Rokosa, as they normally would, to review the rundown. (Tr. 267, 300-301). Hess claimed that he discovered that the Xfile 3 device was not functioning "shortly after 10:00 a.m.," which is when he claims he told Adelson, Rokosa, and Skorich about the problem. According to Hess, Adelson, Rokosa, and Skorich responded to this news in a manner suggesting that "it didn't seem like a big concern to them." (Tr. 301). Hess later testified that he and James Dean tried to repair the Xfile 3 device, but were unable to do so, and certain video clips did not make it to air. (Tr. 268-273). Hess also asked Billy West ("West"), an engineer for F&F Productions to assist with the Xfile 3 device.[13] (Tr. 269). Ultimately, Hess testified that certain clips could not load, were lost, and did not air. (Tr. 271-272). Adelson and Rokosa both denied that Hess informed them of the problem with the Xfile device on the morning

[13] Billy West ("West"), who did not testify, later allegedly generated a technical report from this race, stating: "X-File 3 was not able to upload or download a MP-4 file we could trans code a MOV file both ways, thinking that we may need to re-install trans coding software will talk with EVS in Charlotte [*sic*]". (GC Exh. 25, p. 19). Marc Orgera ("Orgera"), the Vice President of F&F Productions, testified that from West's report there is no way to determine that West actually inspected the Xfile 3 device to determine for himself what the issue was. (Tr. 370). Also, Orgera stated that the Xfile 3 device worked properly for the remainder of the 2016 racing season and was never replaced. (Tr. 369-371; *see also* Tr. 647). Orgera also stated that West regularly failed to submit his reports in a timely fashion and was later terminated from his position for job performance issues. (Tr. 369-370, 372-373). It is notable that the ALJ credited the story concocted by Hess and West – the two individuals who were both terminated, by different employers, based on their incompetence.

of the race. (Tr. 567-568, 647, 684). Meanwhile, Dean testified that he told Hess about the malfunctioning Xfile, and that he discovered the issue around 8 or 9 in the morning. (Tr. 410).

Hess's testimony is undermined by that of Adelson and Rokosa, as well as NHRA Director of Broadcasting Operations Rob Hedrick ("Hedrick"), who was also present at the Indianapolis race. To this end, Hedrick testified that on September 5, Hess's problems went beyond any issues with the Xfile, as there were multiple occasions where Skorich or Adelson called Hedrick to report that they were missing video clips that Hedrick had already provided to Hess for the show. (Tr. 719-720). Hedrick was forced to provide Hess the clips for a second time, suggesting that Hess had misplaced the clips. (Tr. 702-703, 719-720). In describing Hess's performance at the Indianapolis race, Hedrick stated: "I would say there was a lack of organization in the tape room that day." (Tr. 702-703). Moreover, Hedrick suggested that this lack of organization resulted in Hess's subsequent problems; specifically, Hedrick noted that if the Xfile 3 device actually had an issue, had it been reported to the appropriate individuals, it could have been resolved in about 10 to 15 minutes, using another program called Adobe Media Encoder. (Tr. 695, 711).[14] Hess presumably knew that, but he did not take this step. In any event, based on either Hess's inability

[14] Hedrick also testified that based on the reel of video files that Hess sent back to NHRA after the end of the Indianapolis race, i.e., the "melt," it appeared that the Xfile 3 device was functioning on the day of the race because in order for files to exist in the melt, they had to have been processed using the Xfile 3 device. (Tr. 707). Further, based on the file directory of the melt, it appeared that the "PitFit WORKOU-045-4-SEP-2016" clip, one of the four video clips that Hess had claimed was not available due to a malfunction of the Xfile device, was in fact available as it existed in the correct format among other video files that had aired on the day of the race. (Tr. 701, 703-705, 710, R. Exhs. 4, 9). Notably, this clip is a different clip than the Del Worsham's Mello Yello Feature clip that Rokosa independently learned was also available for air. (See Tr. 679-680, 704, R. Exh. 9). Simply put, there is undisputed proof that at least two of the four video clips that Hess claimed were not available due to a device error during the show, were available on the day of the race.

to resolve the problem, or his failure to inform the producers of the ongoing unavailability of the clips, the clips did not air, whether intentionally or negligently.

C. The Union's Organizing Campaign

Turning to the organizing campaign, it is undisputed that members of NHRA's management, including Adelson and Rokosa, only became of aware of general union organizing in early September. (Tr. 536, 637-639). Adelson testified that he first learned of the union activity on or around Sunday, September 4 at the Indianapolis race, when Creative Director Brian Stoll told Adelson that Stoll had overheard "something about a union discussion" at the hotel. (Tr. 108-109, 536). It is undisputed that during this conversation, Stoll did not identify any employees who were present at or who had participated in the "union discussion." (*Id.*) Similar to Adelson, Rokosa first learned of general union activity by the employees on late Friday, September 2 when Frank Wilson, a FOX television producer, told him that a union had started organizing the employees. (Tr. 637-640). Wilson also did not identify any employees participating in the union campaign. (*See* Tr. 637-638). Gurrola testified that, while she was not at the race, she learned of the union activity by telephone around the same time as Adelson and Rokosa, and specifically on September 3. (Tr. 491).

That the Union had commenced an organizing campaign was later confirmed by the Union Representative Culleeny himself. Following the Indianapolis race, Culleeny attended the next scheduled racing event in Charlotte, North Carolina, held from September 16 to 18. (Tr. 176-177, GC Exh. 18). On Friday, Culleeny and another Union official named Jason Rosine entered the secured television compound where employees worked and approached Adelson, introducing

themselves and stating: "we're IATSE, did you know that you have an organizing drive going on?" (Tr. 176-177, 214, 179).[15]

NHRA's response to the Union's campaign from early September on was twofold. First, it trained Gurrola regarding her role in responding to employees' questions and concerns about the organizing. (Tr. 492-493). Second, NHRA held two large meetings and circulated lawful campaign materials through email in order to provide employees with information about union organizing and the election process. (GC Exhs. 8-11, 26(a), 26(b), 27(a), 27(b)). NHRA's first meeting was held on or around September 16 at the Charlotte race. (Tr. 493-495). Gurrola was present at this meeting and spoke to employees from a prepared list of five or six message points that acknowledged that the Union was attempting to organize the employees, and that NHRA was opposed to a union representing them. (Tr. 493-497, GC Exh. 26(b)). Without Gurrola's or NHRA's knowledge, this meeting was recorded by James Dean, and both the audio recording and transcription of what Gurrola said is admitted in the record. (GC Exh. 26(a), (b)). The transcription provides, in relevant part:

> But I also wanted to talk about another really important thing that has come up and that is the union . . .'cause I know that some of you have been approached and talked to about perhaps going in the union . . . and I wanted to have the opportunity to tell you what we think about it, ok, what I personally think about it [unintelligible] human resources.
> (GC Exh. 26(b)).

Gurrola went on to assure employees that unionization was their right, but NHRA was opposed to unionization; she further informed employees that she would be around for the remainder of the race weekend to meet them and answer questions. (*Id.)*

[15] Although Culleeny did not initially specify the date on which he and Rosine confronted NHRA management and announced the campaign, later in his testimony, he noted that on the same day, Rosine called OSHA to report unsafe working conditions; he later testified that he called OSHA on Friday, it logically follows that Culleeny was at the track late Friday morning or early Friday afternoon. (Tr. 179).

D. 8(a)(1) Allegations Involving Marleen Gurrola and Michael Rokosa

In the Complaint, the General Counsel alleged that Gurrola's September 16 comments violated the Act by soliciting employee grievances and creating an unlawful impression of surveillance. (*Id.*)[16] Similarly, Paragraph 10 of the Complaint alleged that on November 15, Rokosa sent an email to potential employees stating that NHRA would delay making job offers for the 2017 racing season. (GC Exh. 1(q) ¶ 10). The text of Rokosa's email is set forth in the Argument section of this brief. (GC Exh. 6).

E. The Mail-Ballot Election and Election Objections

As described above, the Union filed its Petition for Representation on October 20, seeking to represent "[a]ll broadcast technicians employed by NHRA." (GC Exh. 1(s)). Pursuant to a Stipulated Election Agreement, a mail-ballot election was conducted by Region 22 between November 15 and November 30 to determine whether the Union would become the certified bargaining representative of NHRA's television production employees. (GC Exh. 1(s)). Eric Pomianowski was the primary Board Agent assigned to conduct the election, and Board Agent Frank Flores assisted him. (*See* R. Exh. 10). Mail ballots were to have been mailed by the Region on November 15 and returned by November 30, and counted thereafter on December 2. (P. Exh. 1). An initial ballot count and Tally of Ballots were made on December 2, which reflected that of the 99 eligible voters, 33 votes were cast for the Union, 22 votes were against the Union, and there were 17 challenged ballots, a sufficient number to affect the outcome of the election. (P. Exh. 10). Subsequently, the Union withdrew its 15 challenges, leaving two challenges by the Region. (GC Exh. 1(s)). Following withdrawal of the Union's challenges, on August 16, 2017, a second Tally

[16] As noted in the Statement of the Case, the ALJ dismissed the allegations relating to Gurrola threatening employees with unspecified reprisals, but found merit to the other two claims.

of Ballots was held, which reflected that 35 votes were cast for the Union, 34 votes were cast against the Union, and there remained two challenged ballots by the Region.[17] (P. Exh. 11). As the challenges were sufficient to affect the outcome of the election, the Union was not certified.

Following the initial Tally of Ballots, NHRA timely filed objections to the election on December 9, asserting that the Region's conduct in mishandling the election failed to provide eligible voters with an adequate opportunity to vote and disenfranchised at least four eligible voters. (*See* GC Exh. 1(s), Attachment B). Specifically, in its objections, NHRA asserted that (1) several voters encountered problems obtaining a ballot from the Region in sufficient time to vote in the election (Objection 1); (2) as a result, NHRA believed that the Region had not mailed all ballots on the agreed-upon distribution date (Obj. 2); (3) the Region failed to comply with the Board's basic guidelines for carrying out mail-ballot elections as set forth in Part Two of the NLRB Casehandling, Representation Proceedings, with respect to having a person readily available for voters to call with questions and requests for duplicate ballots (Obj. 3); (4) as a result, voters had difficulty contacting an official at the Region to determine why they had not received ballots in a timely manner initially, had to leave repeated voicemails, and thereafter, did not receive timely responses to requests for duplicate ballots or the duplicate ballots themselves (Obj. 3); (5) eligible voters Robert Logan, Paul Kent, and Patrick Ward did not receive their ballots in a timely fashion and were unable to reach the Region to request duplicate ballots in sufficient time to vote (Obj. 4,

[17] The challenges by the Region concerned votes by (1) Nathan Hess, the alleged discriminatee, who, because of his termination did not appear on the voter list, but was able to vote nonetheless; and (2) Josh Piner, who, like Hess, because of his termination did not appear on the voter list, but was able to vote nonetheless. Neither of these votes should count because, for the reasons stated herein, both Hess and Piner were lawfully terminated prior to the election and thus ineligible to vote. Further, Piner executed a settlement agreement with NHRA on claims surrounding his termination, which contained a release and non-admission clause negating any such argument that Piner was terminated unlawfully and thus should have been eligible to vote. Accordingly, only Hess's vote remains subject to challenge.

6, and 7); and (6) eligible voter Todd Veney's ballot, although mailed by him on November 28 – a date when he could reasonably anticipate timely receipt by the Region through the normal course of the mail – was not counted in the election, despite the fact that it was timely when mailed (Obj.5). (GC Exh. 1(s), Attachment B).

Turning to the specific circumstances surrounding each potential voter, Robert Logan testified that he was an eligible voter who resided at the exact address provided to the Region during the election period. (Tr. 48-49, R. Exh. 3, p. 20). Logan was aware of the election and aware that ballots were scheduled to be mailed on November 15; however, he testified that he did not receive his ballot in the mail within a reasonable period after the Region's scheduled mailing date. (Tr. 38). As a result, on November 23, Logan called the Regional Office three times (11:55 a.m., 11:56 a.m., and 2:40 p.m.) to report that he had not received his ballot and to request a duplicate. (Tr. 38-39, 56, R. Exh. 6). The telephone number Logan called, (973) 645-2100, was the one provided on the Notice of Election, which states in relevant part:

> Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by Tuesday, November 21, 2016, should communicate immediately with the National Labor Relations Board by either calling the Region 22 Office at (973) 645-2100 or our national toll-free line at 1-866-667-NLRB (1-866-667-6572).
> (P. Exh. 3, Tr. 38).

This number connected Logan to an automated answering machine. (Tr. 38, 601, R. Exh. 5). Logan left a voicemail, in which he identified himself, stated that he had not received his ballot in the mail, and requested a duplicate one. (Tr. 55, 601). After receiving no response, on November 25, Logan once again called the telephone number listed on the Notice of Election at 3:21 p.m. (Tr. 602, R. Exh. 5). Logan left a second voicemail, noting that he had still not received his ballot and again requesting a duplicate be sent. (*Id.*) The Region did not respond to either of Logan's voicemails before the end of the voting period. (Tr. 40, 47).

Thereafter, on or around November 26, Logan emailed Union Representative Culleeny and NHRA Vice President Gurrola about his missing ballot. (Tr. 46, 56-58). Culleeny provided Logan with a direct telephone number for Board Agent Flores. (Tr. 39). Logan called Mr. Flores on November 30, 2016, to explain that he had not received his ballot and that he needed it sent to him to timely vote in the election. (R. Exh. 5, 10, Tr. 39, 55-56, 58). During this conversation, Mr. Flores told Logan that the Region was experiencing difficulties with mailing the ballots for the election to voters across the country, and that they were "having problems nationally."[18] (Tr. 39). Mr. Flores further stated that the Regional Office's number listed on the Instructions to Employees was not being monitored by the Region. (Tr. 55, 603). Mr. Flores told Logan that the Region would send a duplicate ballot as quickly as possible to allow Logan sufficient time to vote before the deadline. (Tr. 39-40). Ultimately, Logan received his initial ballot on December 5, 2016, three days after the votes had been counted. (Tr. 39). Logan received his duplicate ballot on December 7, 2016, five days after the votes had been counted. (Tr. 39). Logan never voted in the election, although he explained at the hearing that he "really wanted to vote." (R. Exh. 3, p. 6, Tr. 39). Regarding his experience with the election, Logan testified:

> I was a little bit mad, you know, a little upset because I really wanted my vote to count. ***And I really wanted to vote. And I need to vote and the general thing after that was, I mean, it didn't really matter it seemed like to anyone that I did or didn't vote***.
> (Tr. 41) (emphasis added).

Logan echoed a similar sentiment in a January 2017 email to the Union Representative, stating, "I still care. I still would have liked to vote … I just don't trust the legal system[.]" (R. Exh. 2).

[18] On January 3, 2017, Union Representative John Culleeny confirmed to Logan that the Union was also aware that the Region was having problems mailing ballots to eligible voters in a timely manner nationwide. (R. Exh. 2). In an email to Logan, Culleeny characterized the Region's handling of the election as "just plain bad work." (R. Exh. 2).

Like Logan, Paul Kent was another eligible voter who resided at the address provided to the Region during the election period. (*See* Tr. 198; R. Exh. 3, p. 19).[19] And, like Logan, Kent also did not receive his ballot within a reasonable period after the scheduled mailing date. (Tr. 195). As a result, on November 25 at 11:32 a.m., Kent called the Regional Office at the number listed on the Notice of Election and left a message explaining that he had not received a ballot, and requesting a duplicate. (Tr. 195-196, R. Exh. 10, p. 7). Kent also emailed the Region to inform it that he had not received a ballot. (Tr. 195). Neither Kent's voicemail nor email was returned, and Kent did not receive a ballot before the voting period closed. (Tr. 205-206). The Region's records show that it mailed Kent a duplicate ballot on November 29, four days after his voicemail and email. (R. Exh. 3, p. 9). Kent ultimately received his initial ballot on December 9, and completed and mailed it in to the Region on December 10. (Tr. 197). The ballot was received by the Region on an unknown date and not counted. (R. Exh. 3, p. 19).

Like Logan and Kent, eligible voter Todd Veney testified that he, too, did not receive his ballot within a reasonable period after the scheduled mailing date, despite living at his record address. (Tr. 27-28). Unlike Logan and Kent, however, Veney eventually received a ballot on November 28, at which point he immediately completed it, placed it in the return envelope provided by the Region, and mailed it back to the Region via two-day Priority Mail at his local Post Office on that same day. (*See* Tr. 27-28, 30). Recognizing that November 28 was close in time to the end of voting period, Veney paid $5.98 to ensure his ballot would arrive at the Regional Office in Newark before the close of the voting period, and he was assured by the Post Office that it would be delivered in two days. (Tr. 30, R. Exh 1). Nevertheless, although Veney's ballot was

[19] Kent did testify that his address is 769 Markdale Street, as opposed to 769 Markdale Road, which is the address listed on the voter list, but it appears these names are interchangeable.

mailed on November 28 and it should have been delivered to the Region no later than December 1 (one day before the count and within the Board's grace period for late-received ballots), it was not stamped "received" by the Region until December 5; thus, his ballot was also not counted in the election. (R. Exh. 1, R. Exh. 3, p. 25).

Finally, on November 22, eligible voter Patrick Ward (who did not testify) emailed Board Agent Eric Pomianowski, informing him that he had not received a ballot, and requesting a duplicate. (R. Exh. 10, p. 5). The Region mailed Ward duplicate ballots on November 23 and again on November 29, which Ward returned. (R. Exh. 3, pp. 8-9). His ballot was postmarked December 1 and marked as received by the Region on December 9. (R. Exh. 3, pp. 10-11). As with the others, Ward's vote was not counted in the election. (R. Exh. 3, p. 25).

III. STATEMENT OF THE ISSUES

1. Whether the election in Case 22-RC-186622 must be set aside because conduct attributable to the Region prevented a determinative number of voters from participating in the election or having their ballots counted? (Exceptions 1-18, 49, 53).

2. Whether NHRA violated Sections 8(a)(1) and 8(a)(3) of the Act by terminating Nathan Hess? (Exceptions 19-37, 49-53).

3. Whether NHRA violated Section 8(a)(1) of the Act by its communications to employees? (Exceptions 38-49, 49, 53).

IV. ARGUMENT

NHRA has provided overwhelming undisputed evidence that the election in Case 22-RC-186622 was fundamentally unfair, that such unfairness is properly attributed to the Region, and that, as direct consequence of the Region's conduct, a determinative number of voters were in fact deprived of their right to decide whether or not they wanted to be represented by the Petitioner for purposes of collective bargaining. The misconduct led to a lack of finality that has harmed everyone; indeed, had the Region performed its job properly, then the most likely result would

have been that the Petitioner would have been rejected by the NHRA employees. Instead, a determinative number of voters were denied their right to cast a ballot, and now, here we are.

While the Region's conduct in this case was patently unacceptable, NHRA has demonstrated that its own conduct did not violate the Act either in its communication with employees regarding the election, or in its termination of Nathan Hess. With respect to Hess, NHRA provided evidence that his discharge was not only lawful, but also entirely justified in light of his performance at the crucial Indianapolis race. As such, and as set forth below, NHRA submits that the ALJ's contrary findings were in error, and should not be adopted by the Board.

A. The Election in Case 22-RC-186622 Must Be Set Aside, and a New Election Ordered, Because Significant Irregularities Attributable to The Region Precluded A Determinative Number of Ballots from Being Received or Counted.

There can be no serious dispute that the election in Case 22-RC-186622 was rife with problems. NHRA employees received their ballots inexplicably late, or not at all; meanwhile, at the Regional office, mail was notated as being "received" days after its expected delivery, with no explanation. The phone number the Region provided for employees to report problems was, according to Board Agent Flores, not monitored. Messages and emails from voters went unreturned, and requests for duplicate ballots sat, ignored, for days. Even repeated attempts to secure a ballot and vote were not always successful, and as a direct consequence of these issues, four voters – that we know of – were denied a voice in their own representation. Given this reality, NHRA submits that this perfect storm of material errors, and the Region's obvious hand in them – including its admission of problems "nationwide" – warrants the election being set aside.

1. Board Precedent Requires That A New Election Be Held Where Board or Party Misconduct Is Shown To Affect A Determinative Number of Voters.

As NHRA argued in its post-hearing brief, the Board has held that in considering mail ballot cases, the guiding principle is that all eligible voters must be afforded "an adequate notice

and opportunity to vote," and not be "prevented from voting by the conduct of a party or by unfairness in the scheduling or mechanics of the election." *Lemco Construction, Inc.*, 283 NLRB 459, 460 (1987). To this end, the Board "applies an objective standard to potential disenfranchisement cases in order to maintain the integrity of its election proceedings." *Garda CL Atlantic, Inc.*, 356 NLRB 594, 594 (2011). Under that standard, "an election will be set aside if the objecting party shows that the number of voters *possibly* disenfranchised by an election irregularity is sufficient to affect the election outcome." *Id.*, citing *Wolverine Dispatch, Inc.*, 321 NLRB 796, 796-797 (1996) (emphasis added). In other words, "when it is alleged that numerous employees were prevented from voting, the Board must assess whether the particular circumstances so affected a sufficient number of ballots as to destroy the requisite laboratory conditions under which elections must be conducted." *Baker Victory Services, Inc.*, 331 NLRB 1068, 1069-1070 (2000), quoting *V.I.P. Limousine, Inc.*, 274 NLRB 641, 641 (1985). Moreover, "if there is a *reasonable possibility* that this occurred and a determinative number of votes are called into question, to maintain the Board's high standards, the election must be set aside." *Id.* at 1070 (emphasis added).

Under this precedent, the mere possibility that even a single voter was disenfranchised can serve as a sufficient basis for the Board to set aside an election if the vote could be determinative. *Garda CL Atlantic, Inc.*, 356 NLRB at 594 (objecting party need not prove that voters did not vote due to complained-of actions, only that it is possible that they did not vote for such reasons).

Along the same lines, and of particular relevance in the instant case, the Board has also ordered that an election be set aside as a result of conduct by the Region that fails to provide an adequate opportunity to vote in a mail-ballot election. In *North American Aviation, Inc.*, 81 NLRB 1046, 1049 (1949), the Board, in ordering a new election, found that a "chain of events leads us to the conclusion that the desires of eligible employees involved herein may not have been given

adequate opportunity for expression," and that, accordingly, there was a "reasonable doubt as to whether all eligible employees were given a fair opportunity to vote[.]" This "chain of events" included, among other things, election irregularities such as voters not receiving their mail ballots from the Region in a timely fashion, and voters being unable to so inform the Regional Office by telephone about the non-receipt of their ballots because of continuous busy signals. *Id.*

Similarly, in *Star Baking Co.*, 119 NLRB 835, 836 (1957), the Board rejected the employer's assertion that a representative election was valid where 28 of the 34 employees returned mail ballots, and ordered that a new election be held because one employee, whose vote was determinative, did not receive his mail ballot:

> [I]t is the responsibility of the Board to establish the proper procedure for the conduct of its elections, which procedure requires that all eligible voters, not merely a representative number, be given the opportunity to vote. It is particularly important to remedy the failure to discharge this responsibility where, as here, the vote of the employee who failed to receive a ballot could have affected the results of the election.

The Board also rejected the employer's argument that it must be shown that the disenfranchised employee would have voted if he had received a ballot. *Id.* at 836; *see also Oneida County Community Action Agency*, 317 NLRB 852 (1995) (Region's failure to mail duplicate ballots to two employees could have affected the election results and necessitated setting it aside); *Davis & Newcomer Elevator Co.,* 315 NLRB 715, 715 (1994) (finding that Region's failure to furnish an employee with a duplicate mail-ballot election kit was not a minor error because vote could have been determinative in the election); *Garda CL Atlantic, Inc.*, 356 NLRB 594, 594-595 (2011) (where Board Agent closed polls early and there was a one-vote margin in the election, a determinative number of voters were potentially disenfranchised; election set aside); *Security '76*, 272 NLRB 201, 201 (1984) (seven undelivered mail ballots tantamount to a failure to provide notice and an adequate opportunity to vote).

Further, in at least one case, the Board has ordered late-received mail ballots counted, where the circumstances showed that the eligible voters reasonably could have expected that their ballots would be timely received by the Region. In *Queen City Paving Co.*, 243 NLRB 71, 73 (1979), the Board decided that the Region should count one ballot that it received after the closing time for casting ballots, reasoning that "a party's failure to meet a deadline for the filing of some matter may be excused if there is a showing that he mailed the matter at a time when he could reasonably anticipate its timely receipt." Accordingly, where voters can reasonably assume that the Region would receive their ballots in sufficient time to be included in the count, such votes should be counted, especially where they may affect the outcome of the election. *Id,*[20]

Under this framework, it is appropriate for the Board to set aside an election where its election standards are not adequately maintained, whether through fault of the Region, or others. In such cases, "the requisite laboratory conditions are not present and the [election] must be conducted over again." *North American Aviation*, 81 NLRB 1046, 1048, n.9 (1949), quoting *Matter of General Shoe Corporation*, 77 NLRB 124, 127 (1948). Additionally, in certain circumstances, it can alternatively be appropriate for the Board to count late-received ballots where voters reasonably anticipated their timely receipt by the Region.

[20] *See also Classic Valet Parking, Inc.,* 363 NLRB No. 23, slip op. at 2 (2015) (Member Miscimarra, dissenting) (finding that the employer raised a substantial issue warranting review where, in the mail-ballot election, a determinative number of voters' ballots were postmarked 5 days or more before the count, but were not received by the Region until after the ballot count and excluded from the tally); *Premier Utility Services, LLC,* 363 NLRB No. 159 (2016) (Member Miscimarra, dissenting) (finding review of employer's overruled mail-ballot objections appropriate where record showed that 48 ballots were postmarked before the end of the voting period but not received in time to be counted in the tally). NHRA notes, however, that both *Classic Valet* and *Premier Utility Services* are distinguishable from the instant case, as neither involved allegations of Board or party misconduct that led to potential disenfranchisement.

2. *The ALJ Erred In Refusing to Give Appropriate Weight to the Evidence Demonstrating that Region 22's Conduct Disenfranchised Voters.*

Again, as set forth above, the uncontroverted testimony reflects that at least three out of four eligible voters at issue here (Robert Logan, Paul Kent, and Todd Veney) were denied an adequate opportunity to vote and were thereby disenfranchised because of serious election irregularities caused by Region.[21]

Thus, the record demonstrates that, at a minimum, Logan, Kent, Veney, and Ward were all denied an adequate opportunity to vote. Furthermore, the Region's failures in this respect are material, especially with regard to the unmonitored telephone number for the Regional Office, as they set off a chain of events that directly affected the rights of at least two voters at issue. Had the Region regularly monitored the telephone number that it provided to voters and timely returned the various messages that it received, Logan, Kent, and possibly other voters would have received their duplicate ballots in time to return them to the Region.

But even if the Region had appropriately monitored the number (or at least regularly checked the automated answering machine), it was still obligated to respond to voters in a reasonable manner by promptly mailing out duplicate ballots when they were requested. That, too, was not done here. For example, the Region's records show that it mailed Ward a duplicate ballot on November 23 – one day after he had requested a ballot. However, the Region did not mail Logan a duplicate ballot until November 28, although he requested one on November 23, the same date as Ward. Hess, who was not even on the voter list, was able to have his ballot sent to him on the same day he made his request; Kent's ballot, on the other hands, took four days to mail, and

[21] Even though the fourth voter (Patrick Ward) did not testify about his voting experience, the record shows that, under Board precedent, he was plainly disenfranchised by the Region's conduct, particularly when viewed in the context of the testimony concerning the election irregularities.

was not sent until November 29. There is no credible reason why the Region responded to some requests and not others, or why Logan and Kent's ballots were so delayed that they had little hope of participating in the election. This is not a case where the harm is speculative, and voters were "possibly" disenfranchised by the mishandling of the election by the Region; in this case, there is actual, concrete evidence that this occurred multiple times, to multiple voters. Further, given the fact that the election results currently stand with a margin of only one vote, it is undisputed that the number of affected ballots could easily have a determinative effect on the election results. Thus, in light of Board precedent and the facts presented here, the election results should have been vacated, and a new election ordered in this case.

3. The ALJ's Erroneous Decision

Unfortunately, the ALJ declined to conduct such an analysis. To the contrary, in his examination of the evidence relating to the disenfranchised voters, he took a different approach – one with no apparent basis in Board law – by engaging in a bizarre sort of "victim blaming" exercise in which he second-guessed the sincerity of the voters' efforts to cast their ballots. In so doing, the ALJ effectively shifted the focus away from the Region, and onto the voters themselves.

For example, despite the fact that eligible voter Todd Veney did not receive his ballot until after November 25, and then indisputably paid to have his ballot delivered to the Region by two day mail – guaranteeing its arrival before the December 2 vote count – the ALJ discounted all evidence of his attempts because Veney did not testify that he actually tracked the package using the number provided on his Postal Service receipt. Based solely on this reasoning, the ALJ found that the evidence relating to Veney did not satisfy NHRA's burden of demonstrating that he was

denied the opportunity to vote.[22] This is preposterous. Meanwhile, though the ALJ admitted that the evidence "does suggest that either the U.S. Postal Service or the Region erred in its handling of Veney's ballot[,]" he declined to engage in any further analysis, and summarily discounted the additional facts that Veney received his ballot late; that he went out of his way and paid to ensure it was returned to the Region on time; and that the Region, for some reason, failed to mark his ballot as received until December 5 – five days after its anticipated delivery. Due to Veney's failure to testify about tracking, the ALJ concluded that the entirety of his testimony carried no weight.

In considering the efforts made by Robert Logan to cast a vote, the ALJ again conceded that, while it was not "optimal" that that Logan left messages with the Region on November 23 and November 25, and even then, a return ballot was not sent to him until November 28, it was still "hard to argue that [Logan] could not have made additional efforts to reach the Board." (JD 26: 24). Of course, the ALJ does not describe what those "additional efforts" would entail, given that Logan had already placed four calls to the number the Region had specifically designated for the purpose of reporting the precise problem he was facing – one could surmise that Logan should have flown to Newark to retrieve the ballot in person rather than follow the specific election instructions, but the ALJ offered no specific insight, or law, as to what would have satisfied Logan's obligation.[23] In any event, the ALJ determined that Logan's failure to take some unknown

[22] Notably, at the hearing, the ALJ questioned Veney regarding the circumstances of his ballot and how he mailed it to the Region, but he did not ask Veney any questions about the tracking information. NHRA submits that if following up on the tracking was a requirement the ALJ intended to impose before crediting Veney's testimony, it would have been proper (and considerably more fair) for the judge to have raised the issue and solicited an answer at that time.
[23] NHRA Excepted (Exception 6) to the fact that the ALJ misstated Logan's efforts in his Decision, finding that he only placed three calls, including two on November 23 (at 11:31 and 11:55 a.m.) and one on November 25 (at 3:21 a.m.). The ALJ further concluded that Logan spoke to an agent on December 28. In reality, Logan's phone records demonstrate that on November 23, he called the Regional Office three times (11:55 a.m., 11:56 a.m., and 2:40 p.m.) to report that he had not received his ballot and to request a duplicate. (Tr. 38-39, 56, R. Exh. 6). After receiving no

remedial action rendered his experience irrelevant to NHRA's objections, and as such, the evidence relating to his disenfranchisement was also given no weight.[24]

The ALJ was even more dismissive of Paul Kent's attempts, stating that the same rationale applied to his efforts to obtain a ballot, and finding that Kent was "required to make more than a single call and send a single email to obtain a replacement ballot." (JD 26: 35-37) (emphasis added). Here, too, the ALJ determined that "it is hard to believe that [Kent] had no opportunity to place an additional call or calls to the Board" after leaving a message on November 25. (JD 26: 36-37). Indeed, the ALJ even suggested that because Kent had travel plans between November 25 and December 4, the fact that the Region delayed four days before sending his replacement ballot was irrelevant, because even if the Region had responded to his request in a timely fashion, Kent would have been out of town. Having yet again excused the Region's failures, the evidence of Kent's disenfranchisement was summarily discounted by the ALJ, as well. (R. Exh. 10).

Finally, with respect to Patrick Ward's attempt to cast a ballot, the ALJ managed to fault Ward even though he was twice forced to request a duplicate. (R. Exh. 10). Noting that the Region sent the ballots to Ward on November 22 and again on November 29, the ALJ then questioned why Ward "failed to mail a ballot earlier than December 1." (JD 26: 49).[25]

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response, on November 25, Logan once again called the telephone number listed on the Notice of Election at 3:21 p.m. (Tr. 602, R. Exh. 5). No employee returned Logan's messages during the voting period, and he only received a response when he called Board Agent Flores directly on November 30. (R. Exh. 10). As such, the ALJ erred in reciting the facts of Logan's attempts.

[24] The ALJ mentioned, apparently in an effort to minimize any appearance of Region misconduct, that the Region "did mail a replacement ballot to Logan on November 28 in advance of the ballot count on December 2[,]" as if this fully satisfied the Region's obligations and immunized it from responsibility. This finding is disingenuous, given the fact that, as the ALJ surely knew, there was virtually no chance of Logan receiving and returning that ballot in time.

[25] It would seem that the logical answer is that the Region sent a second ballot at Ward's request on November 29 because he had not yet received the ballot allegedly mailed on November 22, and Ward returned whichever ballot finally arrived after he placed that call. Thus, it would reasonably follow that Ward, who was clearly waiting for his ballot to arrive, returned it as soon as he could.

Clearly, the evidence shows the Region's mail-balloting processes and procedures suffered some unacceptable breakdown, and yet the ALJ refused to draw that reasonable inference. Instead of recognizing that four different voters from different parts of the country were all disenfranchised in the same way, the ALJ approached the evidence of each uncounted ballot in piecemeal fashion, systematically dismissing each complaint as though it arose in a vacuum. Still, while the ALJ refused to consider the evidence as a whole, the fact of the matter is that the Region, not the United States Postal Service or the voters, either caused, or materially contributed to, multiple ballots being rejected as untimely.[26]

Indeed, rather than recognizing that the common denominator in the balloting problems was the Region, the ALJ seized every possible opportunity to disparage the voters' attempts and dismiss the evidence of election interference, while simultaneously holding the Region blameless for all of the problems the voters faced. For example, the ALJ criticized Logan and Kent in part because they only attempted to call one of the numbers listed by the Region in the Election Notice. But this criticism misses the mark, and ignores the fact that – not only was this the number that the Region provided – the number they called was connected to a voicemail system, where each left messages. The ALJ's contention that voters should have known to call the other number would be valid if, for example, the first number was out of service, or rang endlessly without being

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Nevertheless, once again, the ALJ dismissed this evidence as insufficient to support a violation – and, in doing so, further discounted or disregarded the evidence that Ward's December 1 ballot was somehow not stamped as received by the Region until December 9.

[26] *See, Podewils v. NLRB*, 274 F.3d 536, 540 (D.C. Cir. 2001)(refusing to give effect to "the inferences the Board draws from the evidence" on the grounds that such conclusions were "quite unreasonable"); *Flagstaff Medical Center, Inc. v. NLRB*, 715 F.3d 928, 935 (D.C. Cir. 2013)(finding that discarding record evidence and "[p]ermitting circumstantial evidence and legal fictions to trump direct proof to the contrary is absurd"); *Picoma Industries,* 296 NLRB 498, 499 (1989)(Board overruling the findings of a hearing officer who "failed to properly consider the cumulative effect of the credited testimony").

answered; in this case, however, the voters had no idea that the number was not being monitored, or that they had not done all that was needed to communicate their problems to the Region. Indeed, from their perspective, they had done exactly what they were supposed to do. More importantly, they were entitled to rely on the Region to listen and act on those messages; they should not be blamed for the fact that they did not immediately realize that the Region was not doing its job.[27]

The ALJ's reference to Nathan Hess calling the same number and receiving his ballot is also unavailing. To this end, in his Decision, the ALJ pointed to Hess's testimony that he called the Region on November 21 and they mailed him a ballot that same day, allowing him sufficient time to vote. (Tr. 281-282). But all this establishes is that one individual – in fact, an individual not even on the voting list – could secure a ballot, while others could not. This is not evidence of a fair, properly-conducted election. Moreover, the fact that Hess's ballot was sent the same day he made his request, while requests by Logan and Kent were ignored for days on end, only reinforces the injustice of the situation. The "best case" scenario here is that receiving a ballot from the Region was a gamble. The darker implication would be that Hess – whose termination by NHRA was being prosecuted by the Region at the time of the election – received preferential treatment that somehow put his request at the front of the line, despite the fact that his name did not appear on the voter list. Either way, the comparison of Hess to the other voters, and to Logan and Kent in particular, only serves to highlight the fundamental unfairness of these proceedings.

[27] While the ALJ cited *Lemco Construction, Inc.*, 283 NLRB 459, 460 (1987) for the proposition that voters have obligations with respect to elections, this is not a case where the voters were indifferent or cavalier about their ballots. The evidence here shows that multiple voters made reasonable, and sometimes extraordinary, attempts to have their voices heard. Quite to the contrary of the judge's characterization, these individuals very much wanted to vote and, as evidence of such desire, they did precisely what the Region's instructions directed them to do. Despite their repeated good-faith efforts, however, their desires were disregarded. This was through no fault of their own.

Furthermore, the ALJ's attempts to discredit voters while protecting the Region is inconsistent with a reasonable reading of the record, and creates a troubling suggestion of bias.

To this end, while the ALJ dissected voters' actions, he categorically ignored the evidence as it related to the Region's conduct. For example, while he was quick to criticize the voters' telephone habits, he offered no opinion of the Region's; yet, the Region was the party that was committing a violation. Specifically, the Region's decision to list a non-monitored telephone number on the official Notice of Election completely contravened the guidelines set forth in the Board's Casehandling Manual: while Section 11336.2(c) of the Manual recognizes that the Board Agent designated for a mail-ballot election "should be an individual who is readily available in the event voters attempt to contact him/her," Section 11336.4 of the Manual states, in relevant part, that: "[a]ny contacts from prospective voters who report they have not received a kit should be given the action warranted." In this case, a Board Agent was certainly not "readily available," given that voters' calls to the Region frequently went unanswered, and messages were not returned. Nor were voters given the "action warranted" by their requests as they waited days for the Region to simply place their ballots in the mail, as the clock continued to tick. Further, according to Logan, Board Agent Flores confessed that the Region knew that the provided number was not being monitored – a blatant admission of the Region's misconduct, and a conscious refusal to abide by its own rules. (Tr. 55, 603).[28] And yet, despite the Region's culpability, the ALJ did not mention the unmanned telephone at all – except in conjunction with his criticism of the voters' conduct.

[28] It is proper to draw an adverse inference because the General Counsel did not call Board Agent Flores to contradict Logan's testimony. Mr. Flores did not deny making this statement, and the General Counsel presented no other witness who disputed Mr. Flores' statement. *See Int'l. Automated Machines, Inc.,* 285 NLRB 1122, 1123 (1987); *Roosevelt Mem. Med. Ctr.*, 348 NLRB 1016, 1022 (2006).

The ALJ's pointed dismissal of facts damaging to the Region is also evident in considering how he addressed the mail issues, and his refusal to look too closely at Region 22's obvious postal problems. As described above, Veney's ballot was not timely received, even though Veney sent his ballot by two day Priority Mail on November 28, allowing sufficient time that he could expect his ballot to be timely received and counted – yet it was not.[29] Still, Veney was not the only one whose postmark seemed at odds with the Region's acknowledgment of receipt; Ward mailed his ballot on December 1, and the Region did not mark it received until December 9. Again, the ALJ refused to recognize that the cumulative effect of this evidence is that there was a fundamental breakdown in the mail ballot process, and that, among all the problems, the only common denominator was the Region. Accordingly, the ALJ's conclusions are wholly unsupported by the record evidence, and are erroneous as a matter of law.

4. The ALJ's Decision Creates Dangerous Precedent, and Introduces an Impermissibly Heavy Burden For Parties Seeking Redress From Regional Misconduct.

Particularly disturbing in this case is the fact that, while the ALJ categorically dismissed undisputed evidence provided by NHRA's witnesses as being insufficient to demonstrate Board misconduct, he did so knowing that NHRA had been foreclosed from calling the very witnesses who could have provided firsthand accounts of Board processes. To this end, both NHRA and the Petitioner made, at various times, requests for documents and information from the Region; while some responsive information was provided, NHRA's subpoena requested a Board Agent to testify as a witness about the procedures used in the election; that request was denied. (R. Exh. 3, 6-7).

[29] With respect to Veney's ballot specifically, there is no reasonable basis as to why Veney's vote should not count when the evidence plainly shows that he mailed it at a time and in a manner such that he could reasonably anticipate timely receipt by the Region through the normal course of the mail. *See Queen City Paving Co.,* 243 NLRB at 73 (1979).

From NHRA's perspective, it is troubling that Flores knew that the telephone number listed on the official Board document for voters was not being monitored during the election, that he expressed this fact to an eligible voter, but that he apparently did not act to correct it. It is equally troubling that employees of the Region delayed mailing duplicate ballots when they had been requested, despite knowing that, given the apparent problems with mail, voters would be lucky to return their ballots in time; moreover, given that the Thanksgiving holiday fell in the middle of the voting period, it is equally troubling that the Region did not increase its efforts at efficiency, or – if it knew that mail delays already posed a problem – schedule the election for a different time. Most of all, it is troubling that the Region was well-aware of these problems, but did nothing to notify the parties, correct the deficiencies, or recommend any solutions that would protect the integrity of the election, and the choice of NHRA employees.

The reality is that, without testimony from a Board agent, the NHRA has no way of knowing when the initial ballots were actually sent, how many messages or emails were not returned, or why the Region's mail was so delayed. But this deprivation of information by the Region should not be fatal to NHRA's objections. What we do know is that at least four voters were denied a voice in this election. [30] We know that ballots were not marked as received by the Region when they should have been; that ballots were not delivered to voters when they should have been; that nobody was monitoring the number the Region provided to voters; and that

[30] The record shows that Logan, Kent, Veney, and Ward were not the only voters who experienced issues in receiving their ballots in a timely manner. The Region's records demonstrate that nine duplicate ballots were mailed between November 9 and 29. (R. Exh. 3). Of course, this figure may not include any eligible voters who may have a called the Region at the telephone number provided, but whose calls or requests for duplicate ballots went unanswered. In fact, it could be argued that only the Region was in a position to know the full extent of the balloting problems, and that the Region should have moved, on its own accord, to extend the time for ballots to be returned and counted.

requests for duplicate ballots were often ignored for days at a time. Equally importantly, we know that all of these problems cannot be dismissed as mere vagaries of mail delivery, nor can they be blamed on the disenfranchised.

NHRA's burden is to prove its objections by a preponderance of the evidence, not beyond a reasonable doubt. The ALJ's refusal to draw reasonable conclusions from the record is erroneous, prejudicial, and contrary to common sense. His ruling begs the question, what would be sufficient if all that happened here was not? While the need for finality is certainly a compelling interest, so is maintaining the integrity of the mail ballot election process. Likewise, where the integrity of the election is compromised due to conduct by the Region, the Board's preference for finality should yield to the preference of those voters whose rights were violated.[31] Where the Region does not act fairly, the entire process is called into question, and the results of the election cannot be trusted. This principal is particularly true here, where the tallied votes are separated by a margin of only one vote, making the process accordingly entitled to greater scrutiny. *See, Hopkins Nursing Care Center*, 309 NLRB 958 (1992).

In all, if the ALJ's decision is adopted by the Board, the resulting precedent will make it a practical impossibility for a party to object to a Region's misconduct relating to an election. According to this Decision, voters would be "required" to do more than follow the Region's instructions and trust in the integrity of the Board; they must do more than send multiple emails and make multiple phone calls. Placing this burden on voters is simply antithetical to the NLRB's mission to protect the integrity of elections. Accordingly, NHRA submits that the ALJ's findings

[31] *See Star Baking, supra* ("it is the responsibility of the Board to establish proper procedure for the conduct of its elections"); *see also Fessler & Bowman, Inc.*, 341 NLRB 932, 933 (2004) (finding that where mail-ballot election procedures are not followed, the integrity of the election process is called into question).

in this regard are contrary to the record, and are erroneous as a matter of law, and that in this instance, the election results should be vacated, and a rerun ordered.[32]

B. NHRA Properly Terminated Nathan Hess Due to His Demonstrated Failure to Perform His Job.

While NHRA submits that the ALJ's handling of the election irregularities was inappropriate, his analysis of the 8(a)(1) and 8(a)(3) allegations was no better, as here, too, he went to great lengths to discredit each of NHRA's witnesses while simultaneously excusing the entirety of Hess's egregious conduct.[33] Indeed, despite his apparent unwillingness to draw any conclusions from the evidence of widespread irregularities in the RC case, the ALJ did not hesitate to make a number of unsupported findings regarding the circumstances of Hess's termination, and – with an admitted lack of any evidence – impute both knowledge *and* animus based on general circumstantial evidence. Throughout his analysis, the ALJ again manipulated the facts to ensure a results-oriented opinion; in doing so, he substituted his own judgment for that of NHRA, ignored

[32] As an alternative remedy, NHRA requests that the late-received ballots of Veney, Kent and Ward be opened and counted and a new tally run. However, given that Logan did not submit any ballot whatsoever, the more appropriate remedy is to set aside the election to ensure Logan is not disenfranchised.

[33] Not surprisingly, NHRA has excepted to the ALJ's credibility determinations in several respects, on the grounds that they are unsupported by the record evidence and demonstrate his inherent bias toward NHRA. Specifically, NHRA excepts to the ALJ's wholesale crediting of Hess, given Hess's obvious self-interest in the proceedings, his inconsistent and vague testimony, and his hostility toward NHRA, his former employer. NHRA similarly excepts to the ALJ crediting a non-contemporaneous work report prepared by a former employee of a third party, which constituted hearsay and should not have been admitted for the truth of the matter asserted. NHRA further excepts to the ALJ's discrediting of Rokosa, on the basis that – as described in the Statement of Material Facts – the ALJ misinterpreted Rokosa's testimony, and incorrectly believed Rokosa claimed that he was on the phone when Hess was terminated. Likewise, NHRA excepts to the ALJ's conclusion that the credibility of all NHRA witnesses was undermined by the fact that NHRA did not call Skorich to testify; Skorich is no longer producing shows for NHRA, and accordingly, the adverse inference should not attach. Beyond that, the idea that one missing witness would negatively impact the testimony of others is highly prejudicial and inappropriate, and further demonstrates the ALJ's hostility toward NHRA.

the undisputed record evidence, and drew highly exaggerated and unfounded inferences from the record facts. As such, the ALJ's findings relating to Hess are contrary to the record evidence and erroneous as a matter of law, and should not be adopted by the Board.

1. Legal Framework

It is well-established that, to prove a violation of Section 8(a)(3) of the Act, the General Counsel must first establish a *prima facie* case of discrimination by showing that an employee's protected activity was a motivating factor for the employer's adverse action. *Wright Line*, 251 NLRB 1083, 1088- 89 (1980), *enf'd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982); *Yellow Trans.,Inc.*, 343 NLRB 43, 47 (2004). If the General Counsel makes out a *prima facie* case, an employer may avoid a finding that it violated Section 8(a)(3) by demonstrating that it would have taken the same action in the absence of the protected activity. *Wright Line*, 251 NLRB at 1089.

2. The ALJ Relied on Insufficient Evidence to Find That NHRA's Termination of Nathan Hess Violated the Act.

As described in detail in the Statement of Material Facts, Hess was terminated after he failed to play four pre-recorded clips during the NHRA's most important live broadcast of the year. While Hess blamed this failure on an equipment malfunction, claiming that he typically stayed a page and a half ahead of the script to anticipate any problems, his explanation could not be credited. Moreover, even if the clips were somehow missing due to equipment problems, the reality was that Hess's fundamental failure to perform his job – either by fixing the clips or (if he stayed a page and a half ahead, as he claimed) notifying a producer of the impending emergency – resulted in panic as producers scrambled to fill four slots on live television; beyond that, it earned the ire of NHRA's biggest sponsor, whose pre-produced clip was not broadcast as planned. According to Adelson, Hess's conduct was so egregious that he questioned whether Hess was truly that

incompetent, or if his actions were intentional; regardless, Adelson testified that Hess had undermined the hard work of the entire crew, and "put the [NHRA's] show in jeopardy." (Tr. 554-557). Accordingly, Hess was terminated.

Given these facts, NHRA argued in its post-hearing brief that the General Counsel failed to establish two elements critical to a *prima facie* case of discrimination. As a threshold matter, because the record contained no evidence that Adelson, the person who made the decision to terminate Hess, was aware of Hess's union activities, NHRA submitted that the requisite knowledge could not be established. NHRA further argued that record was devoid of animus. Finally, even assuming such elements did exist, NHRA submitted that the overwhelming evidence clearly demonstrated that Hess was terminated for a legitimate, non-discriminatory reason; NHRA would have – and should have – terminated anyone who failed so egregiously in their duties.

In ruling on the matter, the ALJ readily acknowledged that there was no direct evidence of NHRA's knowledge of Hess's union activities on the record, confirming that the extent of Hess's union activities were signing a union authorization card on August 6, attending several union meetings between August and early September, and talking to other non-supervisory employees about the union during the same period of time. (Tr. 258-259). The ALJ admitted that there was no evidence that Hess ever engaged in this activity in front of Adelson, or that Adelson knew he had signed a card, or was distributing them. Nevertheless, the ALJ went on to conclude that a *prima facie* case of discrimination was established based on circumstantial evidence.

While, in this Decision, the ALJ comingled the elements of knowledge and animus, largely relying on the same factors to establish the existence of each, he pointed to five main "findings" which, in his view, tended to suggest that Hess's discharge was unlawful. These included: "the timing of the discharge shortly after NHRA learned of the organizing campaign[;]" the "abrupt

nature of the discharge without significant investigation[;]" "the sudden promotion of an EVS operator with no tape producer experience and limited availability[;]" "the failure to offer a consistent explanation for discharging Hess[;]" and "other evidence of pretext[.]" (JD 24: 9-14). NHRA submits that, even combined, these elements fall far short of establishing a *prima facie* case, and that the ALJ's conclusions on these points are patently wrong.[34]

With respect to timing, the ALJ suggests that NHRA terminated Hess only after it had learned of the general union activity at the Indianapolis race. But the timing of Hess's discharge was not the fault of NHRA; that was completely Hess's doing, because it was on that weekend that he failed to play four pre-recorded clips. NHRA had no control over that, and accordingly, it cannot be blamed for the fact that Hess's extremely poor performance coincided with NHRA first obtaining a general knowledge of the organizing campaign. As the Board has long held, mere coincidental timing between an employee's alleged protected activity and the decision to terminate is insufficient to infer anti-union motivation. *See e.g., NEPTCO, Inc.,* 346 NLRB 18, 20 (2005) ("Coincidence in time between union activity and discharge or discipline is one factor the Board may consider . . . [b]ut mere coincidence is not sufficient evidence of [union] animus.") (*quoting Chicago Tribune Co. v. NLRB,* 962 F.2d 712, 717-18 (7th Cir. 1992)).[35]

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[34] Although he apparently did not rely on this factor when arriving at his final conclusions, the ALJ "initially" noted that his finding of knowledge and animus was supported by the fact that Adelson, upon first learning of the organizing, asked who was involved. Indeed, Adelson candidly testified that in his surprise, the first thing he asked Stoll, who had mentioned the organizing to him, was who was involved. It is undisputed that Stoll did not name any names. There is no indication that Adelson seriously sought the identity of any union supporters, or that he voiced the question at any time other than in the context of this initial surprised reaction when speaking to a supervisor. The ALJ places undue significance on a comment that Adelson readily admitted to making, and this cannot serve as the basis for establishing knowledge or animus.

[35] Moreover, especially if Hess's "performance" was intentional, the timing could be explained as being a "set up" to engage in conduct so egregious that it would necessarily constitute a firing offense – and, thus, pretext for a ULP. Or, Hess could have sabotaged the show in retaliation for

In addition to timing, the ALJ concluded that circumstantial evidence of knowledge and discriminatory motive was further established because Hess's discharge was "abrupt and rushed" and undertaken without significant investigation; but this, too, misstates the circumstances of Hess's termination, and misapplies the law.

Again, it is undisputed that Hess failed to have four video clips in place and ready to air during a racing event being broadcast live on network television. There is no allegation that this did not happen; indeed, Hess testified that it was his responsibility to ensure that scheduled video clips were in place and ready to air during the telecasts, and that the clips in question did not air at the Indy race. Hess failed to do his job, and the fact that he was terminated as a result should not come as a surprise to the ALJ.

Similarly, to the extent that the termination was "abrupt and rushed," the ALJ offers no explanation for this conclusion, which is contrary to the record; in reality, Hess was not actually terminated for several days after the Indy race, after Adelson had an opportunity to review the events with Rokosa and Skorich. Yet given the egregious nature of Hess's failure, there would be no reason to further analyze or delay his termination; again, as Adelson explained, in his view, the only question was whether the clips aired or not. They had not, so there was little left to discuss.

Along those same lines, while the ALJ contended that the "investigation" into Hess's misconduct was lacking, in reality, there was not much to investigate – while Rokosa did observe that one of the unplayed files was on the Xfile on the day of the race, and he reported this back to Adelson, there was no real way to establish the motivation behind Hess's failure. Meanwhile, the

learning of Adelson's decision to give him the lesser wage increase. Either way, if Hess's behavior was intentional, as seems likely, then the timing was completely Hess's choice.

Xfile machine indicated that it had worked that day, and NHRA never experienced any similar problems with the unit. There simply was not much more Adelson could learn.

While it is apparent from the ALJ's decision that he strongly disagreed with NHRA's decision to terminate Hess for his conduct and the manner in which it was done, it is not his place to decide. To this end, the Board recognizes that "[a]n employer has the right to determine when discipline is warranted and in what form. 'It is well established that '[t]he [B]oard cannot substitute its judgment for that of the employer' and decide what constitutes appropriate discipline.'" *Cast-Matic Corp.,* 350 NLRB 1349, 1358 (2007) (citations omitted); *Framan Mech. Inc.,* 343 NLRB 408, 411-12 (2004) ("[I]t is well settled that the Board should not substitute its own business judgment for that of the employer in evaluating whether an employer's conduct is unlawful."). Indeed, the Board has "emphasize[d] [that] at the outset […] 'the crucial factor is not whether the business reason cited by [the employer was] good or bad.'" *Id.* at 411-12 (citations omitted); *M,A.N. Truck & Bus Corp.,* 272 NLRB 1279 (1984); *Mini-Indus., Inc.,* 255 NLRB 995 (1981). Here, the ALJ substituted his own judgment for that of the Employer in a complex, live television event production environment – given the highly specialized nature of the work, the ALJ's conclusory finding is even more inappropriate.

Further, to the extent that the ALJ finds fault with NHRA's investigation because he has concluded that the failure to play the clips was due to equipment error, it is also well-established that, where an employer asserts that employee misconduct was the reason for the discharge, an employer "does not need to prove that the employee actually committed the alleged offense. It must show, however, that it had a reasonable belief the employee committed the offense, and that the employer acted on that belief in taking the adverse action against the employee." *Midnight Rose Hotel & Casino,* 343 NLRB 1003, 1005 (2004) (emphasis in original). Here, the evidence

shows that NHRA had, at a minimum, a justifiable and reasonable belief that Hess committed the offense, and it acted on that belief in terminating him. It is not within the General Counsel's purview to second guess whether the circumstances of Hess's failures warrant a lesser punishment.

Still, the entire inquiry misses the mark, as in many ways, the equipment failure at issue in this case is a red herring. While Hess blamed the Xfile as being responsible for his poor performance, in reality, the weight of the evidence demonstrates that the real problem was that if the machine was, indeed, malfunctioning, then Hess either failed to fix it, or he failed to provide the producers with explicit notice that the clips could not be played. As Hess himself testified, organization and communication are key elements in any television production; this is particularly true when the event is being produced live. To this end, Adelson testified that in live television, even when things are going well, the atmosphere can be chaotic, and crew members – and certainly the tape producer – have to anticipate what is coming. This is the reason for the morning meetings and the daily sheets, and again, according to Hess himself, why he sought to stay a sheet and a half ahead so he would know what was coming and he could have it prepared.

From a practical perspective, if Hess had effectively communicated that the clips were not working to the producers, then there would have been no moment of panic, because they would have known not to play them. The producers would have known to take them off the schedule, or they would have contacted someone else to fix them. Even in Hess's version of events, when he allegedly told the producers that the files would not load, they responded with indifference – if this was, in fact, what happened, then it only further establishes that Hess failed to properly inform his superiors about a critical problem. This constituted a fundamental breakdown in communication, and because Hess was the one with responsibility for the tapes, he was the one to blame for others

not knowing their status. Thus, for this reason as well, there simply was not much for Adelson to investigate, and Hess's termination was entirely appropriate based on Hess's own performance.

The ALJ next concluded that NHRA "failed to provide Hess with a contemporaneous reason for his discharge that was consistent with its defense at trial" because NHRA did not "mention the missing clips in explaining to Hess the reason for his discharge." The ALJ found this constituted "inconsistent and shifting reasons for discharging Hess" which served as "strong evidence" of pretext, knowledge, and animus. But this finding is simply parsing words, and NHRA's reason for terminating Hess has always been his failure to play the clips at the Indy race.

In reality, there is no question that when Skorich called Hess and informed him that he was terminated, both men knew precisely why. In Hess's own recitation of the conversation, Skorich had barely told Hess that they were going in a different direction before Hess jumped in and defended himself by blaming the Xfile for the clips not playing, asking "you are aware the Xfile went down and that's why we didn't have the video we needed for the Indy race?" Skorich confirmed that he had heard about the issues (although, as described above, there was no way of determining whether the "issues" originated with Hess or with the Xfile), but also mentioned additional problems with organization and things not being located that had persisted through the weekend. This, according to both Hess and Skorich in an email he sent to Adelson, was the sum of the conversation.

Nothing about Skorich's comments to Hess suggest that Hess's termination was the result of anything other than Hess's failure to play the tapes. Pointing out that Hess also had problems with organization and finding files earlier in the weekend does not take away from the major incident of his misconduct; if anything, Skorich offered these examples to demonstrate that the incident on Monday was not entirely isolated, and that it very likely could have resulted from the

same lack of organization and ability to find things that had plagued Hess all weekend. There is nothing inconsistent about Skorich pointing this out; indeed, it was a fair response to Hess's immediate defense, which was to blame the failure on equipment. The ALJ simply cannot credibly say that this conversation constitutes shifting defenses, and thus, this finding is erroneous, as well.

Finally, the ALJ pointed to the promotion of EVS Operator Paul Kent to replace Hess as evidence of knowledge and animus, on the grounds that there was no evidence in the record to demonstrate that Kent was qualified for the job, and thus, the ALJ was "confounded" by why he would be chosen for the role. But this finding is completely irrelevant to the case, and suggests wild speculation by the ALJ. Regardless, as explained above, the ALJ is not entitled to substitute his own judgment for that of NHRA, even if he believes an employee to be unqualified for a position. Moreover, the ALJ cannot point at the lack of evidence in the record relating to Kent's credentials as evidence of his unsuitability, because, quite simply, Kent's credentials were not germane to the objections or the complaint; the record would necessarily be devoid of the details of his work history. The ALJ is grasping at straws, and the promotion of another employee with an undetermined skillset, occurring after Hess's termination, is not appropriate circumstantial evidence that can be substituted for actual knowledge.[36]

Finally, to the extent the ALJ relied on NHRA's lawful opposition to Union organizing to establish evidence of animus, this, too must fail. To this end, Section 8(c) of the Act states that "expressing any views, argument, or opinion […] shall not constitute or be evidence of an unfair labor practice […] if such expression contains no threat of reprisal or force or promise of benefit." It is well-settled that opposing unionization, without more, or simply stating a personal belief that

[36] Presumably, the ALJ mentions Kent based on some unsubstantiated belief that Kent was rewarded the tape producer job based on his opposition to the Union; however, there is absolutely nothing in the record to support this idea. The ALJ's baseless speculation is entirely inappropriate.

employees are better off without a union does not establish unlawful animus. *See NLRB v. Gissel Packing Co.,* 395 U.S. 575, 618 (1969) ("[A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'"); An inference of unlawful motivation cannot be based on generalized statements about union organizing absent some evidence linking that animus to the adverse employment action. In this instance, even if NHRA's communications with employees were found to be unlawful, the alleged unlawful conduct by management occurred after Hess's termination, and thus, they simply cannot be used to show animus for his termination.

Indeed, even when all of these elements are considered together, the ALJ's cherry-picked collection of findings do not make up for the fundamental lack of union knowledge in this case. Even the ALJ's wildest speculations cannot overcome the reality that Adelson was the decision maker, and the record remains devoid of evidence connecting Adelson's general knowledge to Hess, which is fatal to the Section 8(a)(3) claim. Accordingly, the ALJ's findings in this regard are unsupported, as well.[37]

Still, even if the ALJ was correct, and the evidence presented was sufficient to establish a prima facie case, his ultimate conclusion would still be improper, because Hess's performance at the Indy race constituted a legitimate and nondiscriminatory justification for his termination.

[37] It is well settled that an employer cannot be unlawfully motivated by union activity where it has no such knowledge of that activity. *See, e.g., Cardinal Hayes Home for Children*, 315 NLRB 583, 588 (1994) (noting that the General Counsel failed to establish a prima facie case because, in part, the decision maker had no knowledge of the alleged discriminatee's union activity); *Diamond Ginger Ale, Inc.,* 125 NLRB 1173, 1177 (1959) ("Essential to such a showing [of an 8(a)(3) violation] … is the [e]mployer's knowledge of the fact that his employee was a member of the union or was actively engaged in its behalf, or both. For it would defy logic to say that an employer could discriminate against his employee because of union activity when the employer never knew of the employee's union membership or activity."); *Volt Info. Sciences,* 274 NLRB 308 (1985).

Despite the ALJ's efforts to characterize it as such, the fact remains that the failure of the four video clips to air on September 5 was not an inconsequential or excusable error. Both Adelson and Rokosa testified that in each of their many years of experience in the television production industry, they had never witnessed a tape producer who failed to have four video clips ready to air during a live telecast like Hess did on September 5. Adelson also expressed that Hess's four successive failures from 1:45 p.m. to 2:55 p.m. during a single race demonstrated a genuine inability to perform the tape producer job – moreover, the sheer magnitude of the failures suggested that they may, in fact, have been "intentional." (Tr. 554). Whether they were the result of incompetence, or they were Hess's revenge for being denied his promised increase four days prior, the effect was the same – Hess's inability to load the video when needed caused panic, forced producers to scramble to fill several minutes worth of air time, and earned a rebuke from NHRA's largest sponsor. Simply put, Hess failed to perform a critical job function, and he did so in an extremely dramatic way; as such, Adelson made the reasonable business decision to terminate him. The ALJ's contrary findings are erroneous as a matter of law, and they should not be sustained.

C. NHRA Did Not Violate the Act in its Communications to Employees.

As a final matter, the General Counsel alleged, and the ALJ found, that NHRA violated 8(a)(1) of the Act by creating an impression of surveillance; soliciting employee grievances; and informing employees that they would not be offered positions for the 2017 season during the pendency of the Union election. As briefly set forth below, NHRA denies that it violated the Act.

With respect to the surveillance allegation, this arises from comments made by Gurrola during the employee speech on September 16, 2016. The essence of the allegation is that, by stating that she "knew" that employees were being presented union authorization cards, Gurrola created the impression that employee activity was under surveillance; this, however, is not

established in the record. Under appositive precedent, the Board has held that an employer creates an impression of surveillance only if "under the circumstances, the employee could reasonably conclude [from the employer's statements or conduct] that his protected activities are being monitored." *Sam's Club*, 342 NLRB 620, 620 (2004). It has also held that a supervisor's statement containing only general or known facts, which the supervisor claimed to have "heard," could not lead an employee to reasonably believe that the employer had embarked on a course of monitoring its employees' union activities. *Clark Equipment Co.,* 278 NLRB 498, 503 (1986).

Applying this precedent to the statement at issue here, no employee could reasonably conclude that Gurrola's remarks about union activity meant that NHRA was surreptitiously monitoring union activities. The evidence in the record reveals that employees had been discussing the Union since early August 2016, and that NHRA had learned of general union activity in early September. Further, on September 16 (the same date that Gurrola made her statement), Union Representative Culleeny approached Adelson, Gurrola, and others in-person at the worksite and announced the campaign, stating "we're IATSE, did you know that you have an organizing drive going on?" Thus, by September 16, the Union's organizing effort was not covert. Under these circumstances, Gurrola's statements could not possibly be found to be intimidating or as evidence of surveillance, and this allegation should be dismissed.

Turning to the solicitation of grievances, the ALJ further found that in that same meeting and in discussions with employees subsequent to that meeting, Gurrola unlawfully solicited grievances and implied that NHRA would fix them to discourage union support. While the ALJ found that Gurrola did have a past practice of speaking with employees, which would permit her to continue that practice during an organizational campaign, he found that in this instance, given the totality of the circumstances, Gurrola's solicitation of grievances took on a different form, as

she was joined by the CEO of the Company, and this would have given employees the impression that she was taking their complaints more seriously.

But the presence of the CEO did not fundamentally change what Gurrola was doing, and indeed, the ALJ found that she was not actually doing anything differently. Employees already would have known what Gurrola's role was; they also would have known that this was her practice, regardless of whether the CEO was also present. Accordingly, her actions were not materially different from her past practice, and this Complaint allegation should have been dismissed.

Finally, with respect to the Complaint allegation concerning Rokosa, the email Rokosa sent to employees on November provides in relevant part:

> Because we are in the midst of a union election, our hands are tied as far as making offers for 2017. Once the votes are counted on December 2, if NHRA wins the election, we will be able to let you know promptly when we can schedule you to work during 2017, based on your availability and our needs. We will also be able to confirm new terms for 2017. If the union wins the election, we will be obligated to bargain certain terms for the 2017 season and we do not know how long that might take.
> (GC Exh. 6).

Contrary to the ALJ's finding, the statements in Rokosa's email regarding job offers for 2017 are true and lawful statements. Indeed, "[t]he Board has long held . . . that once employees choose to be represented, an employer may not continue to act unilaterally with respect to terms and conditions of employment – even where it has previously done so routinely or at regularly scheduled intervals." *Total Sec. Mgmt. Illinois 1, LLC*, 364 NLRB No. 106, slip op. at 1 (2016). Rokosa's email indicating that if "the union wins the election," NHRA "will be obligated to bargain certain terms for the 2017 season," informed employees of the realities of having a representative for purposes of bargaining, and that NHRA could not unilaterally make job offers without consulting the union if it won the election. Neither the General Counsel nor the Union could seriously doubt that a duty to bargain over the contents of the job offers, e.g., wages, travel

wages, employment status, meals and per diem, and the like, would not arise in the event that the Union won the election. The statements here served to communicate that fact to the employees.[38]

Finally, it is worthy of note that had NHRA made job offers during the pendency of the election, the offers could have given rise to a charge against the NHRA alleging that it unlawfully conferred benefits on employees to influence their decision or the election outcome. Thus, the NHRA here is placed in an impossible "Catch-22" dilemma whereby both offering jobs for the subsequent racing season, and communicating to employees that it was holding off on doing so until the election results were known could have equally constituted violations of the Act. This simply cannot be, and this allegation should be dismissed.

V. CONCLUSION

For the foregoing reasons, NHRA respectfully requests that the Complaint be dismissed in its entirety and that the election be set aside, or in the alternative, that the ballots of Todd Veney, Paul Kent, and Patrick Ward be opened and counted.

Respectfully submitted this 7th day of December, 2018.

X Daniel P. Murphy X

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[38] Further, when read in full, it is not reasonable for an employee to interpret the email as expressing that Union representation would delay job offers for 2017. Instead, it is more plausible that an employee would interpret the email as expressing what it actually said: the fact that during the pendency of the election, NHRA is adopting a reasonable "wait-and-see" approach to determine how the outcome of the vote would impact its 2017 operation, not that NHRA would refuse to make job offers if the Union won the election or refuse to bargain with the Union.

CERTIFICATE OF SERVICE

I hereby certify that on this day, I served the forgoing BRIEF IN SUPPORT OF EXCEPTIONS by electronic mail on the following parties:

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This the 7th day of December, 2018.

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